STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

J. Cordell Maddox, Jr., Circuit Court Judge

MICHAEL ADAM BAILEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000651

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether Petitioner's Sixth Amendment rights were violated when appellate counsel failed to raise on appeal the preserved issue of whether the trial court abused its discretion in refusing to grant Petitioner a continuance so as to allow Petitioner sufficient opportunity to determine if the indictment of record was properly obtained from the Grand Jury as the indictment of record alleged additional elements not previously included in an earlier indictment and was not served until the day of trial?

II.

Whether Petitioner's Sixth Amendment rights were violated when appellate counsel failed to raise on appeal the preserved issue of whether the trial court abused its discretion in refusing to sever Petitioner's trial from that of co-Defendant, Michael Carr, where there existed a substantial possibility that the indictment of record and testimony of Carr would prevent the jury from making a reliable determination about Petitioner's innocence or guilt?

STATEMENT

Indictment

On July 28, 2008, Petitioner Michael Bailey was indicted by the Horry County Grand Jury for murder (indictment of record).[1] App. 851-852.

Second Indictment and Trial

On July 23-26, 2007, Petitioner proceeded to trial before the Honorable James E. Lockemy and a jury. App. 1 – App. 2. Petitioner was represented by William I. Diggs and the State was represented by Assistant Solicitor Bert Von Herrmann. Petitioner was tried with co-defendant Michael Carr, who was represented by James Galmore.

The jury returned a verdict of guilty as indicted. App. 732, ll. 19 – App. 733, ll. 2. Judge Lockemy sentenced Petitioner to thirty years incarceration.

Direct Appeal

On appeal, Petitioner was represented by Joseph Savitz. App. 745 – App. 752. Savitz perfected Petitioner's appeal on June 4, 2009. *Id.* The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion filed on June 10, 2010. *State v. Bailey*, Op. No. 2010-UP-306 (S.C. Ct. App. filed June 10, 2010); App.755 App. 756.

PCR and Evidentiary Hearing

On June 10, 2011, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of trial and appellate counsel and prosecutorial misconduct. App. 757 – App. 767. The State filed a return on July 21, 2011. App. 768 – App. 772.

[1] July 28, 2005, is the date stamped on the second indictment presented by the State and provided to the defense for the first time on the day of trial. For reasons more fully argued below, the actual date this indictment was stamp may have been on the eve of trial.

On August 26, 2013, an evidentiary hearing was held before the Honorable J. Cordell Maddox, Jr. App. 773 – App. 838. Petitioner was represented by J. Marshall Biddle and the State was represented by Assistant Attorney General Suzanne White. Judge Maddox denied Petitioner's application in an order filed on January 30, 2014. App. 839 – App. 850.

This petition for writ of certiorari follows.

ARGUMENT

I.

Petitioner's Sixth Amendment rights were violated when appellate counsel failed to raise on appeal the preserved issue of whether the trial court abused its discretion in refusing to grant Petitioner a continuance so as to allow Petitioner sufficient opportunity to determine if the indictment of record was properly obtained from the Grand Jury as the indictment of record alleged additional elements not previously included in an earlier indictment and was not served until the day of trial.

Relevant Facts

On September 28, 2004, Michael Carr, Petitioner, Antonio Davis, and Duriel Simmons borrowed Nikki Phillip's, Carr's girlfriend, car and went to Joseph Patterson's residence. App. 508, ll. 1 – App. 513, ll. 24. Patterson was a drug dealer. *Id.* Carr and Petitioner went to Patterson's apartment while Simmons and Davis waited in the vehicle. App. 515, ll. 7-18. While Petitioner and Carr were at Patterson's apartment; Carr shot and killed Patterson. App. 517, ll. 21 – App. 519, ll. 25.

Pre-trial Motion to Sever

On the day of trial, defense counsel moved to sever Petitioner's and Carr's trial on the grounds that the co-defendants presented antagonistic defenses and were of different races, which increased the chance of prejudice. App. 49, ll. 3 – App. 51, ll. 20. Defense counsel also noted that Carr was almost certainly going to be impeached if he took the stand and denied that a robbery had been planned as the State would introduce a video-taped statement that Carr made to police where he admitted that the group planned to rob Patterson, but claimed that Davis was the shooter. App. 50, ll. 1-24.

Counsel feared that the jury would conflate Carr's discredited testimony with Petitioner's unimpeachable claims of ignorance. App. 51, ll. 2-20. The trial court denied Petitioner's motion to sever. App. 57, ll. 16 – App. 59, ll. 6.

Pre-trial Indictment Presentation and Motion for Continuance

Next, Petitioner moved to strike the indictment of record on the grounds that it was defective as South Carolina has no felony murder rule and Petitioner had not received a copy of the indictment of record prior to the day of trial. App. 59, ll.17 – App. 60, ll. 12. Before hearing from the State, the trial judge noted that the indictment he had was different. App. 60, ll. 9-24. The State had created two indictments against Petitioner.

Both indictments were true-billed and both had been stamped by the clerk. App. 70, ll. 7-24. The indictment of record alleged Petitioner did:

> Combine with two or more people to commit an unlawful act, i.e. robbery and/or burglary and, in the execution of the criminal act and as a natural and probable consequence of the criminal act the victim, JOSEPH PATTERSON, JR, was willfully, feloniously and intentionally killed with malice aforethought either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about SEPTEMBER 28, 2004.

App. 104, ll. 6-18. Defense counsel renewed his motion for a continuance and motion to sever co-defendants' trial so as to allow time for the indictment issue to be resolved. App. 64, ll. 23 – App. 65, ll. 8. The indictment handed to the trial court by the State alleged that Petitioner:

> did in Harry County on or about September 28th, 2004 willfully, feloniously intentionally kill the victim, Joseph Patterson, junior, with malice aforethought either express or implied by means of shooting him.

App. 59, ll. 18-22.

The State apologized for the confusion caused by the two indictments and claimed ignorance as to how the mistake occurred. App. 68, ll. 5-12. The State then argued that both

indictments adequately put Petitioner on notice that he had to defend against a murder charge. *Id.* The Clerk of Court was surprised by the problem, and noted that "anyone could have gone in and copied [true-billed page of the indictment]. . . . I don't know who clocked it." App. 70, ll. 4-6. The Clerk also stated that her office does not stamp indictments, rather, the Solicitor's Office does. App. 102, ll. 7-23. In arguing that the indictment issue was immaterial, the State stressed that an indictment is simply a notice document, proclaiming "there is no distinction between felony murder and murder. The only thing that that indictment is supposed to do is put them on notice as to the murder." App. 83, ll. 18-22.

Defense counsel argued that the indictment of record was convoluted and shifted the focus of the case from murder to an alleged burglary and robbery. App. 97, ll. 13-21. Counsel noted that the indictment of record suspiciously conformed with the expected testimony of Petitioner's co-conspirators turned State's witnesses. Like Petitioner; Davis, Simmons, and Phillips had, in the years leading up to trial, maintained that the group went to Patterson's apartment to purchase marijuana. App. 156, ll. 1 – App. 158, ll. 20.

All three had reached agreements with the State to avoid murder charges. App. 249, ll. 1-24; App. 357, ll. 16 – App. 360, ll. 5. All three were now prepared to testify that the group, including Petitioner, had planned to rob Patterson and that Petitioner was armed on the night Patterson was shot. App. 46, ll. 8-22. Counsel believed the differences in the indictments were the result of the State incorporating the new evidence in order to bolster their case. App. 46, ll. 8 – App. 49, ll. 8. Defense counsel also reiterated that he was only given the indictment of record on the morning of trial. App. 101, ll. 10-12.

In arguing its position, the State admitted that the indictment of record better reflected their evidence, "we have only located one firearm in this case and it is – we believe it not to be the

murder weapon . . . . The ballistics came back on it inconclusive. . . . We have witnesses that have seen that gun, that saw [Petitioner] with that gun at the crime scene and has [*sic*] indicated that same witnesses that Mr. Carr was the one that shot him." App. 96, ll. 4-20. The trial court summarized the State's case as alleging that Petitioner and others intended to commit a robbery and that the murder of Patterson by Carr was a natural and probable consequence of that robbery. App. 93, ll. 2 – App. 94, ll. 16.

Petitioner countered that the State was introducing additional theories into the case; making it easier to get a conviction and to play the co-defendants off of each other. App. 94, ll. 17 – App. 95, ll. 8. Petitioner then renewed motions for a continuance and a severance on the grounds that the indictment of record was not given to the defense with sufficient notice and that the new indictment included different elements than the original. App. 99, ll. 16 – App. 101, ll.9.

The trial judge rejected the defense's motion and then asked the State to select which indictment they wished to proceed on. *Id.* Unsurprisingly, the State's elected to proceed on the carefully tailored, factually detailed indictment of record. App. 96, ll. 2 – App. 97, ll. 21. The court appeared to blame defense counsel for not checking with the Clerk's office to determine if the indictment of record was on file prior to the day of trial, despite defense counsel having no particular reason to suspect a second indictment had been created. App. 102, ll. 1-25.

When also identified for blame, the Clerk clarified that the Solicitor's Office places the time stamp on indictments and the Clerk's office simply places the indictment in the file and records its number. *Id.* Petitioner had not been formally re-indicted, nor had he waived presentment of any indictment. App. 68, ll. 5 – App. 70, ll. 20. Petitioner and defense counsel were unaware of the existence of the indictment of record until the day of trial.

Testimony of Phillips, Davis, and Simmons

At trial the State alleged that Carr shot Patterson during an attempted robbery and that Petitioner, who was also allegedly armed, was his accomplice along with Simmons, Phillips, and Davis. App. 151, ll. 12 – App. 153, ll. 9. The State called Simmons, Phillips, and Davis, who had all been charged in relation to the murder. All three claimed that Bailey was armed and had agreed to help Carr rob Patterson. They also admitted that they each had agreements with the State and were testifying in order to secure a better plea offer.

As noted, all three had substantially changed their stories in the weeks leading up to trial from supporting Petitioner's testimony to supporting the allegations in the indictment of record. Prior to striking deals with the State all three had made statements consistent with Petitioner's version of events, which was that the group had planned to buy marijuana from Patterson. App. 217, ll. 18 – App. 244, ll. 22. Once they reached cooperation agreements with the State, all three witnesses' stories changed and conformed to the factual scenario alleged in the indictment of record, which, according to the date it was stamped, pre-dates these agreements by two years. App. 305, ll. 1-23; App. 851 –App. 852.

Forensic evidence presented by the State was inconclusive with respect to Petitioner's involvement. The gun attributed to Petitioner by the three co-defendants turned State's witnesses could not be matched to any of the shots fired at Patterson's apartment. App. 479, ll. 5-25. Shoe print impressions taken from the area where Petitioner was alleged to have hidden his gun did not match Petitioner or Carr. App. 448, ll. 10-17. Carr's gun was never recovered. Likewise, the only identifiable fingerprints taken from Patterson's front door belonged to Carr. App. 426, ll. 8-14.

Petitioner's Testimony at Trial

Petitioner testified that he was visiting with a group of friends and other individuals he did not know as well on the day of Patterson's death. App. 506, ll. 5 – App. 507, ll. 24. Petitioner said that the group decided to make a collective purchase of marijuana. *Id.* Petitioner contributed twenty-dollars towards the purchase and agreed to accompany Carr to the dealer's apartment. *Id.* Petitioner stated that the group left to make the purchase late at night and that Simmons drove the car. App. 510, ll. 12-17; App. 515, ll. 12-13.

Petitioner stated that he did not realize Carr was armed until moments before Carr shot Patterson. App. 517, ll. 21-23. Once Carr pulled his gun on Patterson, Petitioner ran downstairs. App. 518, ll. 7 – App. 519, ll. 18. Petitioner recalled that after the shooting, he was scared and remained with the group overnight out of fear of Carr. App. 528, ll. 5-22. Petitioner left the group the next morning once he felt it was safe. App. 529, ll. 6-21. Petitioner denied having any intention to rob Patterson or that the group had planned to do so. App. 536, ll. 19-21.

Co-Defendant, Mike Carr's Testimony at Trial

Carr claimed that Petitioner had shot and killed Patterson during their purchase of marijuana. App. 566, ll. 15 – App. 567, ll. 12. Carr alleged that he was reluctant to purchase marijuana from Patterson because the drug dealer had "shorted him" during an earlier buy. App. 556, ll. 8 – App. 557, ll. 11. Carr posited that Petitioner accompanied him to the buy because he did not want Patterson to short the group. App. 562, ll. 2-8. Carr claimed that during the purchase, Petitioner asked to use the bathroom and returned with his gun visible through his clothes. App. 565, ll. 2 – App. 567, ll. 20. Carr then claimed that Petitioner shot Patterson when confronted about the gun. *Id.* Carr denied knowledge of any plan to rob Patterson. App. 574, ll. 1-18.

However, during a break in testimony and outside the presence of the jury, the State authenticated a video-taped statement made by Carr while he was interrogated by law enforcement. App. 583, ll. 1-14. In the video Carr states that he was hired as a lookout for the robbery and that Davis was the shooter. App. 592, ll. 1-5. When the jury returned, the State cross-examined Carr with this statement and he initially denied making it. App. 592, ll. 1-15. Carr then confessed to making this statement, but claimed he was coerced. App. 593, 18-19. Finally, Carr reluctantly admitted to making the statement. *Id* at ll. 20-23. The State then proceeded on a point by point questioning of Carr on his statement; thoroughly impeaching him and discrediting his prior testimony. App. 592, ll. 20 – App. 594, ll. 4.

Jury Instructions

The trial court's charge to the jury included a definition of "hand-of-one, hand-of-all". App. 713, ll. 13 – App. 715, ll. 11. The trial court also extensively defined "intent" as including: "intending the result which actually occurs, not accidently or involuntary. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent." App. 714, ll. 16-20.

The jurors were also given a charge on the elements of burglary and robbery as part of the indictment against Petitioner. App. 717, ll. 5 – App. 719, ll. 17. The trial court then gave instructions on withdrawal. App. 719, ll. 18 – App. 720, ll. 18. However, the Court also charged the jurors on withdrawal, which was significant because even if the jurors concluded that Petitioner had planned to rob Patterson, they could still believe that Petitioner had communicated his withdrawal from the plan by leaving Carr prior to Patterson opening the door. App. 517, ll. 21 – App. 519, ll. 25. The trial court ended his charge with the following:

> The common purpose may not have been to kill and murder, but if the intended act was unlawful and in the execution of the common purpose a homicide was

> committed by one as a probable or natural consequence of the act done and the results of a common design, then all present participating in the unlawful common design are as guilty as the slayer. But [if] the killing had no connection with the common purpose and did not ensue as a probable result of an intent to execute common purpose, then the slayer alone is responsible for guilt. It is immaterial whether the defendant charged with the accomplice liability knew in advance that his co-defendant would choose the victim. The gravamen of the offense is that the murder was a natural and probable consequence of the other crime in which the defendant had voluntarily chosen [*sic*] to participate.

App. 721, ll. 3-20.

Direct Appeal

Defense counsel recalled that he specifically requested Chief Appellate Defender Joseph Savitz represent Petitioner. App. 798, ll. 21-25. Counsel stated that he knew appellate counsel from his tenure at the Office of Appellate Defense and believed that appellate counsel would competently address the issues with the indictment. App. 799, ll. 3-9. Defense counsel testified to his surprise upon reading Petitioner's brief, which exclusively focused on the State's isolated references in closing argument to the State's witnesses failure to take polygraph examinations. App. 799, ll. 10 – App. 801, ll. 12.

Defense counsel was disconcerted by the decision to brief only this issue since defense counsel had introduced the evidence that the witnesses never took a polygraph in an effort to discredit the witnesses. *Id.* Defense counsel also recalled that he had provided appellate counsel with an affidavit detailing his belief that the indictment of record had not been presented to a grand jury, and that it represented a meritorious issue on appeal. App. 818, ll. 20 – App. 819, ll. 4.

PCR and Evidentiary Hearing

Petitioner and defense counsel testified at the evidentiary hearing. Petitioner stated that both he and defense counsel were surprised by the appearance of the indictment of record, which differed substantially from the original indictment. App. 783, ll. 3-25. Petitioner said that counsel advised

him that there was no felony murder rule in South Carolina and that the State would be required to prove the intent to kill or that Petitioner was the shooter. App. 784, ll. 4-18. With respect to appellate counsel, Petitioner testified that the only issue appealed was references by the State to a lie detector test. App. 785, ll. 2-6. Petitioner stated that he did not know why appellate counsel only addressed this issue. *Id.*

Defense counsel testified, consistent with the facts outlined above, that the indictment of record was a "major surprise" and was completely different from the indictment he had received in discovery. App. 797, ll. 10 – App. 799, ll. 12. Defense counsel believed that the indictment of record was fraudulently obtained and that it had not been presented to the Grand Jury. App. 766. Counsel noted that, at a minimum, the indictment of record was not served on Petitioner until the day of trial and that it contained additional elements related to robbery and burglary that were tailored to the State's case and the changed testimony of Phillips, Simmons, and Davis. App. 806, ll. 2-12.

Counsel also conceded that Petitioner may not have understood the implications of hand-of-one, hand-of-all. App 796, ll. 7-11. With respect to the issue of severance, defense counsel stated, "I felt clearly Mr. Carr was [going to] to the stand and commit perjury . . . . for us to have to be sitting there with that co-defendant under those circumstances was extremely prejudicial. Why it wasn't pursued at the appellate level I have no idea" App. 798, ll. 11-20.

Reflecting again on the issues with Petitioner's direct appeal, counsel said that a "there had been some inappropriate, improper conduct with respect to the presentation of that indictment. I don't think the grand jury returned that indictment." App. 820, ll. 13-16. Counsel reiterated that the severance and continuance were meritorious issues that should have been briefed. *Id.* at ll. 6-9.

Moreover, counsel noted that appellate counsel's decision to only raise the polygraph references was particularly questionable as defense counsel's cross-examination of the witnesses had introduced that testimony in the first place, "I introduced the polygraph evidence. Why would you argue on appeal that the State had made an error or the Court had made an error." App. 800, ll. 16-19.

Order of Dismissal

In denying Petitioner's application, the PCR court held that Petitioner failed to demonstrate how the use of the indictment of record prejudiced him. App. 848. The PCR court also noted that indictments are simply notice documents and that Petitioner was given sufficient notice under the first indictment as to the charges he was facing. *Id.*

Addressing appellate counsel's performance, the PCR court determined that appellate counsel was aware of the issues with the indictment, but instead chose to focus on the polygraph comments. App. 845. As appellate counsel did not testify, the PCR court presumed that appellate counsel's decision not to appeal the indictment issues was the result of sound professional judgment. *Id.*

Discussion

The trial court abused its discretion in refusing to grant a continuance due to the additional elements in the indictment of record, which was sprung on Petitioner on the day of trial. Appellate counsel rendered ineffective assistance of counsel by failing to raise this meritorious and preserved issue.

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court established the constitutional right to *effective* assistance of counsel

in *Powell v. Alabama*, 287 U.S. 45 (1932).

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 117-18, 386 S.E.2d at 625 (internal citations omitted).

The constitutional right to the effective assistance of counsel includes the right to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 398 (1985). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). The question is therefore (1) whether appellate counsel's performance was deficient, and (2) whether Petitioner was prejudiced by appellate counsel's deficient performance.

"The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." *State v. Yarborough,* 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick,* 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

In the present case, appellate counsel should have raised the court's denial of a continuance because the day-of-trial reveal of the indictment of record prejudiced Petitioner and rises to the level of an abuse of discretion. App. 101, ll. 10-12. The indictment of record alleged additional elements compared to the previous indictment. App. 806, ll. 2-12. As defense counsel noted, the indictment of record was tailored to the State's evidence and only served on Petitioner on the day of trial. App. 94, ll. 17-25. Until reaching agreements with the State; Phillips, Davis, and Simmons supported Petitioner's account of the group's plan to purchase marijuana. App. 217, ll. 18 – App. 244, ll. 22. After the State agreed not to seek murder charges against the three and to give them credit for cooperating, all three changed their accounts to allege that a robbery had been planned. The indictment of record duly reflected these changes.

In support of his belief that indictment of record was fraudulently obtained and that Petitioner was tried on an indictment that was not presented to the Grand Jury; defense counsel provided appellate counsel with a sworn affidavit. App. 764 – App. 767. In the affidavit, defense counsel stressed that the Clerk of Court confirmed Petitioner had only been indicted once. *Id.* Further, counsel outlined how the clerk had revealed that the portion of the indictment stamped "True-Billed" could have been copied by anyone with access to the file and that the Solicitor's Office controlled the stamp. *Id.* Moreover, the original indictment, which the State's elected not to use, could no longer be located in the clerk's file after Petitioner's trial. *Id.*

While indictments are notice documents, they must inform the accused of the "**nature and scope of the accusations**" and the accused must be given the opportunity to "**question the propriety of the accusations, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined.**" *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 499 (2005) *citing State v. Faile*, 43 S.C. 52, 59-60, 20

S.E. 798, 801 (1895) (*emphasis added*). The State's presentment of the indictment of record on the day of the trial violated this principle and the trial court should have granted a continuance to allow the defense time to determine the source of the indictment of record and to allow Petitioner the opportunity to access the scope of the new allegations.

Further, even as a notice document, the indictment of record is problematic given that it alleges additional and different crimes from the original murder indictment. Once objected to a circuit court must determine whether the indictment provides sufficient notice to the accused. *Gentry*, 363 S.C. at 102, 610 S.E.2d at 500. A trial court judges the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and **(2) whether it apprises the defendant of the elements of the offense that is intended to be charged.** *State v. Wilkes,* 353 S.C. 462, 578 S.E.2d 717 (2003); *see also* S.C. Code Ann. § 17-19-20 (2003). Under this test, the indictment of record adds the elements of burglary, robbery, and felony murder to original indictment; thus Petitioner was not adequately informed of the charges he had to defend against until the day of trial.

Appellate counsel's decision to only appeal isolated references to a polygraph examination in the State's closing should not be afforded the presumption of a valid trial strategy. *State v. Simkins*, 303 S.C. 364, 401 S.E.2d 142 (1990) (issue of witness' testimony was a meritous one, counsel's failure to raise the issue on appeal establishes ineffective assistance of counsel). Appellate counsel was aware of the indictment issues, but addressed an issue completely devoid of merit. *Roseboro v. State,* 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant

has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Even assuming that the isolated references to the witness' failure to take a polygraph was an error by the State; defense counsel had clearly opened the door to such a comment by cross-examining the witnesses on that portion of their written agreement with the State. *State v. Robinson,* 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) (a party cannot complain of prejudice from evidence to which he opened the door).

Accordingly, the trial court abused its discretion in refusing to grant Petitioner a continuance so that the defense could investigate the source of the indictment of record and so the defense counsel could prepare to defend against the additional, elements alleged in the indictment of record. For the reasons set forth above, Petitioner was prejudiced by appellate counsel's failure to raise this preserved issue for appeal.

The PCR court's finding that appellate counsel's performance was not deficient is not supported by the evidence. App. 845 – App. 846. As Petitioner would have been entitled to a new trial had appellate counsel briefed this issue, Petitioner is now entitled to the grant of post-conviction relief and a new trial. *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002) (holding appellate counsel was deficient in failing to adequately raise or brief issue of prosecutorial retaliation where Court of Appeals would have reversed if counsel had properly argued the issue).

II.

Petitioner's Sixth Amendment rights were violated when appellate counsel failed to raise on appeal the preserved issue of whether the trial court abused its discretion in refusing to sever Petitioner's trial from that of co-Defendant, Michael Carr, where there existed a substantial possibility that the indictment of record and testimony of Carr would prevent the jury from making a reliable about Petitioner's innocence or guilt.

Discussion

Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right, and a defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction. *See State v. Dennis*, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). A severance should be granted when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or ***prevent the jury from making a reliable judgment about a codefendant's guilt***. *State v. Harris*, 351 S.C. 643, 652–53, 572 S.E.2d 267 273 (2002) (*emphasis added*); State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999).

This Court has held that an appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001). Motions for severance are addressed to the discretion of the trial court. *State v. Nichols*, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997); *See State v. Singleton*, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991) ("[W]e admonish trial judges to be cautious in allowing joint trials. While joint trials are permissible, trial judges must carefully consider problems which may arise from a joint trial).

In the present case, appellate counsel should have raised the trial court's denial of a severance because the joint trial prevented the jurors from making a reliable judgment on

Petitioner's guilt. The indictment of record was tailored to the State's joint case, specifically the new evidence generated when the State reached a deal with three of Petitioner's co-defendants. Previously, all three witnesses' statements had agreed with Petitioner's accounts. App. 50, ll. 14-24. It was only the verge of trial when the co-defendants began to seek deals with the State that their stories dramatically changed. All of their deals required them to give evidence against Petitioner and Carr.

Moreover, as the PCR Court noted, Carr's testimony was completely discredited by his prior statement and the ballistic results. App. 841 – App. 842. His testimony had a prejudicial influence on Petitioner's case as Petitioner's credibility was negatively impacted by the factually impossible story offered by Carr. Furthermore, all of the forensic evidence presented by the State –the shoe prints, fingerprints in Patterson's apartment– indicated that Carr was the shooter.

The State was also able to allude to a video recording of Carr's prior statements to the police, where he denied shooting Patterson but admitted to planning a robbery. App. 591, ll. 11 – App. 593, ll. 25. While not entered into evidence, the State used the threat of this video footage to pressure Carr into admitting to having made the statements recorded on the video. *Id.*

Finally, the indictment of record when evaluated in conjunction with the indictment against Carr; prejudiced Petitioner as it invited the jury to apply Carr's discredited, inconsistent testimony and prior statement to the police to the Petitioner. Accordingly, a severance of Petitioner's and Carr's trials was necessary to insure that any verdict against Petitioner was the result of the juror's determination against him, and not simply a reflection of their disbelief in Carr's account.

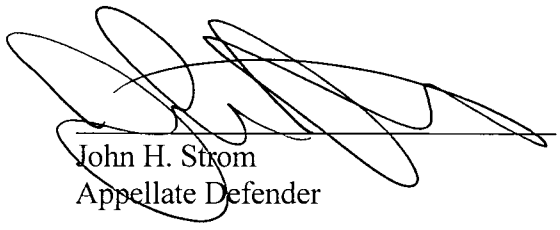
Therefore, the trial court abused its discretion in refusing to grant Petitioner severance For the reasons set forth above, Petitioner was prejudiced by appellate counsel's failure to raise this

preserved issue for appeal. The PCR court's finding that appellate counsel's performance was not deficient is not supported by the evidence. App. 845 – App. 846. As Petitioner would have been entitled to a new trial had appellate counsel briefed this issue, Petitioner is now entitled to the grant of post-conviction relief and a new trial. *See Simpkins* 303 S.C. 364, 401 S.E.2d 142; *see also Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, allow further briefing, and ultimately reverse Petitioner's conviction.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County
J. Cordell Maddox, Jr., Circuit Court Judge

MICHAEL ADAM BAILEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000651

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of December, 2014.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of December, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.